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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

PAUL WINDELS, JR.
Attorney for Petitioner
51 West 51st Street
New York, New York 10019
(212) 977-9600

Of Counsel:
WINDELS, MARX, DAVIES & IVES
CHARLES L. STEWART
CRAIG P. MURPHY

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this reply brief in order to correct certain clear factual misstatements in the government's brief upon which it bases its entire opposition to the petition for a writ of certiorari.

GOVERNMENT'S BRIEF AT PAGE 5:

"One of the agents, Kenneth Walton, apparently lost his temper and told Strong that, if he did not follow instructions in the future, 'he would throw Strong out of the window or inform [petitioner] that Strong was an informant.' (Pet. App. A-20 - A-21)."

THE RECORD:

There is no support in the record for the above supposition. In describing the threat, Strong himself wrote that three FBI agents had "threatened my life by personally guaranteeing I would be killed" (C.A. App. 605c).* Strong claimed that he had a tape recording of the incident (C.A. App. 605c-605d). In the district court, petitioner sought an evidentiary hearing, and the government vehemently opposed petitioner's request (C.A.App. 679-81). It now attempts to minimize the significance of this extraordinary incident by suggesting, without any support at all, that "[o]ne of the agents . . . apparently lost his temper." The government cannot have it both ways. In light of its opposition to petitioner's request for a hearing respecting the incident, its attempts to trivialize the actions of a senior supervising FBI agent, in the presence of two of his subordinates through pure supposition should be summarily rejected by this Court.

GOVERNMENT'S BRIEF AT PAGE 7:

"Another request [petitioner's specific pre-trial discovery request which the government now admits required disclosure of the murder threat] which apparently was not brought to the attention of the district court in connection with the motion, was for 'each statement, promise, assurance or representation made by any governmental authority to any [government] witness which could reasonably give hope for lenient treatment or which could be considered an inducement to cooperate with the government' (*id.* at A-40)."

THE RECORD:

The record belies the government's assertion that petitioner did not rely in the district court on his request for "each statement . . . made by any governmental authority to any [governmental] witness which could reasonably . . . be considered an inducement to cooperate with the government." In the district

* References preceded by "C.A. App." refer to the Joint Appendix filed in the Court of Appeals.

court, in an affidavit submitted in support of his motion for a new trial, petitioner noted that prior to trial he had "made a specific request" for any communication between the government and any witness which could be considered an inducement to cooperate (C.A. App. 612). During oral argument before the district court, the government did not deny that such a specific request had been made (C.A. App. 697-738). In denying the motion, the district court "assume[d]" that petitioner had made a specific request and that "the government was required to turn over Agent Walton's statement in response to [petitioner's] request" (A-28).* The district court denied the motion for a new trial only on the basis of its conclusion that evidence of the FBI's threat to murder Strong "would not have produced a different result" at trial because petitioner's RICO conviction on Count I, and his sentence of five years imprisonment thereon, would not be affected even if Strong's testimony, and accordingly petitioner's conviction on the tax counts, were written off (A-29).

GOVERNMENT'S BRIEF AT PAGES 10-11:

"However, petitioner did not mention that additional discovery request [the specific request discussed above] in his brief in the court of appeals. He there relied exclusively on his more general request for records, memoranda and correspondence 'which might reasonably reflect on the witness' motives and relationship with the government' (Pet. C.A. Br. 53) — a request petitioner does not now contend is 'specific' enough to necessitate stricter review. Thus to the extent that the court of appeals applied an incorrect standard, it is directly attributable to petitioner's own incomplete presentation of the issues to that court."

THE RECORD:

This is absolutely false. The facts are these: In his initial brief in the court of appeals, petitioner simply noted (at 52), that the district court had correctly "assumed" that he had made a

* References preceded by "A" are to the appendix to the petition herein.

specific request and that the murder threat should have been disclosed. In its answering brief, the government asserted that petitioner had failed to make a specific request, and it quoted the two more general requests. Then, in his reply brief, petitioner clearly refuted this argument by setting forth his specific request for "each statement...made by any governmental authority to any [governmental] witness which could reasonably... be considered an inducement to cooperate with the government." We annex hereto Point IX of petitioner's reply brief in the court of appeals. The specific request described above is at pages 32-33 of that reply brief (A-49-A-50). Thus, that request was clearly before the court of appeals when it considered this issue. We note further that there is absolutely no basis for the government's characterization of that request as an "additional request." It was no afterthought, and the district court clearly understood that a specific request had been made and should have been honored.

GOVERNMENT'S BRIEF AT PAGE 11, NOTE 10:

"Petitioner asserts (Pet. 9) that he raised the issue of [the above specific discovery request] in his 'briefs' before the court of appeals; however, he did so for the first time in his petition for rehearing in the court of appeals (Pet. for Reh. 3-4). Petitioner does not claim that he raised the issue before the district court in his motion for dismissal or new trial."

THE RECORD:

Again, as clearly demonstrated above, this representation is absolutely false. In fact, in its memorandum in opposition to the petitioner's motion for reargument in the court of appeals (at 4), the government conceded that the above specific discovery request had been raised by petitioner in his briefs before the court of appeals prior to its decision.

GOVERNMENT'S BRIEF AT PAGE 7:

"The district court denied the motions...[c]haracterizing the discovery demand as merely a general request for exculpatory material..."

THE RECORD:

The decision of the district court clearly shows that it "assume[d]" petitioner had made a specific request for evidence of the FBI's threat to murder Strong (A-28).

GOVERNMENT'S BRIEF AT 7:

"The court [of appeals] rejected petitioner's claim that the government had not complied with his discovery requests, for reasons substantially the same as those of the district court."

THE RECORD:

As pointed out above, the district court "assumed" that petitioner had made a specific request and that information concerning the murder threat should have been turned over in response to it (A-28). The court denied his motion for a new trial on the grounds that his RICO conviction and five year sentence of imprisonment would stand even if the Strong testimony and petitioner's conviction of the tax counts were written off (A-29 - A-30). We point out that at trial, the government's case was based almost entirely on the highly inflammatory grand jury testimony of two witnesses, Taggart, "the missing mistress," and Strong, the "pay-off" man. The court of appeals wrote off the Taggart testimony on the grounds that it had been admitted in support of an illegal charge. It sustained the Strong testimony, however, on the erroneous ground that petitioner had failed to make a specific request for evidence such as the government's threat to murder Strong (A-21). In so doing, the court of appeals ignored the undisputed record as set forth in petitioner's brief to it, and then without any explanation refused to correct what was a crucial misstatement, and in its opinion upon which a five-year sentence of imprisonment was sustained.

GOVERNMENT'S BRIEF AT PAGE 9:

"The district court and the court of appeals, both of which focused their attention on the discovery requests explicitly relied upon by petitioner in his motions for dismissal and new trial

in the district court and the brief in the court of appeals, concluded (Pet. App. A-21; see also *id.* at A-29) that the requests constituted 'a general request for exculpatory evidence' subject to the standards set by this Court in *United States v. Agurs*, 427 U.S. 97 (1976)." (Footnotes omitted).

THE RECORD:

As already pointed out, the district court correctly "assumed" petitioner's discovery request was specific (A-28). The more general discovery requests were presented to the court of appeals by the government in its answering brief, not by petitioner. In his reply brief, petitioner then set forth his request for "each statement...made by any governmental authority to any [governmental] witness which could reasonably...be considered an inducement to cooperate with the government." The court of appeals apparently overlooked this crucial fact and based its opinion on the two more general requests presented to it by the government, noting erroneously that these two were the "only" requests (A-21 - A-22).

GOVERNMENT'S BRIEF AT PAGES 10-11:

"The Strong testimony related to one of the RICO predicate offenses on which the jury convicted. As only two predicate crimes are needed to obtain a conviction under the RICO statute (see 18 U.S.C. 1961(1), (5)), and the jury found that petitioner had commited 10 such acts, Strong's testimony could not have affected the verdict." (Footnotes omitted).

THE RECORD:

Petitioner was convicted on two tax counts (Counts VII and VIII) as well as on the RICO count, and Strong's testimony was the *only* evidence supporting the tax counts. He was sentenced to concurrent terms of imprisonment of three and five years and fined $15,000 for his tax convictions which the government now so cavalierly writes off. Moreover, in light of the court of appeal's finding that Taggart's grand jury testimony must be disregarded because it had been admitted in connection with

an illegal RICO predicate, petitioner's conviction on the RICO count, and his sentence of five years imprisonment and a fine of $50,000, cannot possibly stand without Strong's testimony.

GOVERNMENT'S BRIEF AT 14:

"[T]he government established at trial that petitioner received the services of chauffeurs, paid by the employer, who did not perform duties for the employer." (Footnotes omitted).

THE RECORD:

The government distorts the record by ignoring crucial facts with regard to petitioner's conviction on the counts relating to the union vehicle. The "chauffeurs" in question were local union officials whose employment with limited duties was open, notorious and pursuant to the formal, industry-wide, collective bargaining agreement. The uncontroverted evidence at trial was that the intent of the respective employers was merely to comply with the requirements of the contract. As it turned out, the employers did not have sufficient work to keep the employees occupied on a full-time basis, and the employees volunteered to serve as drivers of the union car in their free time. The government has never contended that any of the employers violated the law. The evidence at trial conclusively established that petitioner did not request that the employees drive the union car. As a result of this arrangement, petitioner was sentenced to five years imprisonment and a $50,000 fine. No decision of this or any other court justifies such an expansive reading of the misdemeanor provision of the Taft-Hartley Act, 29 U.S.C. 186 (b)(1), let alone such a highly leveraged application of the RICO statute.

GOVERNMENT'S BRIEF AT PAGE 16:

"It is therefore apparent, that the court below cited and applied the [harmless-beyond-a-reasonable-doubt] standard petitioner urges [in connection with the erroneous admission of the Taggart grand jury testimony]."

THE RECORD:

The decision of the court of appeals states, "[t]here was no *substantial possibility* of a prejudicial spillover effect in this case." (A-18; emphasis added). The court of appeals thus explicitly applied a substantial prejudice, rather than a harmless-beyond-a-reasonable-doubt standard of review. As pointed out in the petition, the latter is clearly applicable when testimony is admitted in contravention of the Sixth Amendment right of confrontation.

CONCLUSION

The government bases its opposition to the petition herein entirely on crucial material misstatements of the record. That it should do so certainly demonstrates the obvious merit of the legal arguments petitioner has presented for review. For this reason, and the reasons set forth in the petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 16, 1984

Respectfully submitted,

PAUL WINDELS, JR.
Attorney for Petitioner
John Cody
51 West 51st Street
New York, New York 10019
(212) 977-9600

Of Counsel:
WINDELS, MARX, DAVIES & IVES
CHARLES L. STEWART
CRAIG P. MURPHY

APPENDIX

Judge Mishler's order. Defense counsel simply did not have the option of producing the tape or foregoing its use in cross-examining Strong.

And, even if Judge Mishler had not ordered production of the tape, defense counsel's use of it during his cross-examination of Strong would not have entitled the government to its production. During cross-examination, defense counsel's use of the tape was limited to showing that Strong had made several statements inconsistent with his trial testimony that William Katsara drove him to appellant's house on the day of the alleged payment (T:880-88, A:359a-i). Under *United States v. Nobles*, 422 U.S. 225, *on remand*, 522 F.2d 1271 (9th Cir. 1975), appellant would have been obligated to produce only the part of the tape relating to the inconsistent statements. In *Nobles*, the Supreme Court held that the defendant had waived his work-product privilege only with regard to the portion of the report used testimonially. 422 U.S. at 240. In this case, the district court ordered defense counsel to turn over the entire tape.

Finally, Rule 613(a) of the Federal Rules of Evidence did not mandate production of the entire tape. That rule requires only that opposing counsel be shown the prior inconsistent statement. It does not mandate production of the entire report or tape in which the statement may be contained.

POINT IX

APPELLANT'S CONVICTION ON COUNTS VII AND VIII MUST BE REVERSED BECAUSE OF THE GOVERNMENT'S FAILURE TO DISCLOSE A THREAT BY AN FBI AGENT TO MURDER, OR CAUSE THE MURDER OF STRONG, THE KEY WITNESS ON THOSE COUNTS, UNLESS HE SUBJECTED HIMSELF TO THE COMPLETE CONTROL OF THE FBI

After reading the government's brief, one would assume that Judge Mishler denied appellant's motion for a new trial on the grounds that evidence of the FBI's threat to murder Strong would not have affected the jury's verdict on the tax counts. This is not the case. The entire thrust of appellant's motion for

a new trial focused on the tax counts (A:684-96). And, Judge Mishler denied the motion solely on the grounds that appellant's RICO conviction would stand even if the Strong testimony were written off (A:747).

On appeal, the government raises a number of arguments to offset the impact of this amazing incident. They were all made to the trial court which disregarded them and resorted to a total write-off of the Strong testimony to save what remained of appellant's conviction.

First, the government argues (at 76) that it did not suppress evidence of the FBI's threat to murder Strong. The point hardly warrants a response. The prosecution clearly had constructive knowledge of the FBI's threat to murder Strong. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Wedra v. Thomas*, 671 F.2d 713, 717 (2d Cir.), *cert. denied*, 102 S. Ct. 3491 (1982); *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975). Indeed, two of the FBI agents present when Walton threatened to murder Strong were at trial on a daily basis assisting the Strike Force in its prosecution of appellant. They were there when a fellow agent testified that Strong was afraid of Cody!

The government also suggests (at 76) that the threat "did not relate to Strong's testimony against Cody." Once again, the point is ludicrous. The threats were admittedly made to assure that Strong would "follow directions" of the FBI agents "who were supervising him" in the Cody investigation; otherwise he would be murdered! And, it was the government which so urgently opposed any hearing to develop the full facts of this incredible incident. Under these circumstances, the wrangling of the government is in and of itself astonishing. It should write-off as expeditiously as possible anything involving Strong in this case, just as Judge Mishler did.

The government further argues (at 76) that evidence of the FBI threat to murder Strong was not exculpatory. This quibble cannot withstand analysis. At trial, the key issue on the tax counts was whether Strong lied in the grand jury when he testified that he had paid a kickback to appellant or at trial when he recanted that testimony. The government supported the latter view with testimony by an FBI agent that Strong

feared Cody. In convicting appellant on the tax counts, the jury obviously accepted this testimony. Evidence showing that the FBI had itself threatened to murder Strong before he testified before the grand jury could certainly have led the jury to the opposite conclusion.

The government further quibbles (at 81-82) that appellant did not make a specific pre-trial request for evidence of "Walton's threat to murder Strong," and that under *United States v. Agurs*, 427 U.S. 97 (1976), appellant must, therefore, demonstrate that the evidence would create a reasonable doubt which did not otherwise exist. The government's argument fails both ways.

As one court has noted, the determination of whether a request is 'specific' or 'general' cannot be made in "a vacuum." *Scurr v. Niccum*, 620 F.2d 186, 190 (8th Cir. 1980). The question is whether under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense desired. *Scurr v. Niccum*, 620 F.2d at 190, *supra*; *United States v. Weidman*, 572 F.2d 1199, 1204 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States v. McCrane*, 547 F.2d 204 (3rd Cir. 1976). In *Weidman* and *McCrane*, the courts found requests less specific than the one made by appellant in this case to be sufficiently specific to give the prosecution notice of what the defendant was seeking. Indeed, in *McCrane*, the government conceded that a request for "disclosure of all promises made to the witness and all actions undertaken on the witness' behalf or at the witness' request" would suffice. 547 F.2d at 208.

In this case, appellant requested that the government disclose "each statement[6] . . . made by any governmental authority to any such witness which could reasonably . . . be considered an inducement to cooperate with the government" (A:98, ¶ 8(c)). In addition, appellant requested "all records, memoranda and correspondence . . . which might reasonably

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6. The government erroneously maintains (at 82) that appellant requested only documentary evidence.

reflect on the witness' motives and relationship with the government" (A:97). In denying appellant's motion for a new trial, the district court assumed that the above constituted a specific request (A:745). It could not have found otherwise.

Surely, Walton's threat to murder Strong might reasonably "be considered an inducement to cooperate with the government." Appellant's request was, therefore, sufficient to put the government on notice that the defense was seeking evidence showing that a witness such as John Strong was testifying on the government's behalf because the government had threatened to murder him. Certainly, FBI threats to murder key witnesses have not become so commonplace that appellant should be expected to have asked for "threats by government agents to murder or cause the murder of prosecution witnesses."

Thus, under *Agurs*, appellant is entitled to a new trial of the tax counts if evidence of Walton's threat to murder Strong "might have affected the outcome of the trial" of those counts. When considered in the context of the evidence on the tax counts, Walton's threat to murder Strong might very well have affected the outcome for it showed that Strong might have lied in the grand jury because he was afraid of the FBI. Moreover, even if appellant did not make a specific request, and the more stringent *Agurs* standard applies, appellant is still entitled to a new trial on the tax counts. Evidence showing that the FBI threatened to murder Strong before he testified in the grand jury would surely have created a reasonable doubt which did not otherwise exist.

The government next presumes (at 83) that even if it had disclosed Walton's threat to murder Strong, appellant's "experienced defense counsel" would not have introduced such evidence at trial because the government would have introduced testimony from Walton showing Strong was afraid of Cody. The government conveniently ignores the fact that it had already introduced evidence at trial to show that Strong was afraid of Cody (T:926-29, 947, 1088, A:817-21, 391b). Walton's testimony would, therefore, have been superfluous.

Appellant's "experienced defense counsel" would surely have introduced testimony showing that FBI agents had threatened to murder Strong to rebut the government's evidence that it was fear of Cody which motivated Strong. We note that the FBI apparently generated Strong's fear of appellant and then exploited it for patently wrongful purposes.

Finally, the government argues (at 85) that appellant had access to Strong and "either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." The government misses the mark. A defense investigator interviewed Strong for several hours and did not elicit evidence of the FBI's threat to murder him.

The reasons Strong did not provide appellant with such evidence are clear. Strong was scared stiff of the FBI on the one hand, and he wanted to use the incident for bargaining purposes in connection with his own complex relations with the Strike Force. The obvious basic fact is that Strong was playing or attempting to play his own hand. He certainly was not under Cody's absolute control as his failure to give up this valuable "bargaining chip" demonstrates.

In sum, the government suppressed evidence which may very well have led the jury to acquit appellant on the tax counts, and the RICO count, as well. Accordingly, appellant is entitled to a new trial on those counts.

CONCLUSION

For the reasons stated in Points I and II, this Court should reverse appellant's conviction on all counts of the indictment. For the reasons stated in Points III and IV, all of appellant's convictions under 29 U.S.C. § 186(b)(1) should be reversed for insufficient evidence and Counts II, IV, V and VI dismissed. For the reasons stated in Point V, appellant's RICO conviction under Count I of the indictment must be reversed, and that count of the indictment dismissed. For the reasons stated in Points VI, VII, VIII and IX, appellant's convictions on Counts

VII and VIII must be reversed and those counts dismissed, or, in the alternative, a new trial ordered.

Dated: New York, New York
June 7, 1983

Respectfully submitted,

WINDELS, MARX, DAVIES & IVES
Attorneys for Appellant
John Cody
51 West 51st Street
New York, New York 10019

Of Counsel:

Paul Windels, Jr.
Charles L. Stewart
Craig P. Murphy
Georgina M. Guernica
Kim Davenport